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International Court of Justice

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High Tribunal!

I do not regard it as my task as Defense Counsel for the SD to prove that crimes which have been proved were not committed. Far be it from me to palliate injustice practiced in any kind of way.

In the proceedings against the SD, we are not concerned with whether individual persons must be punished for crimes committed; it is much more important to determine whether, according to the outcome of the evidence submitted, a circle of 3,000 officially active persons and 30,000 purely honorary office-holders, who were collected under the designation SD in Offices III and VI, can be declared criminal.

I have to deal with this question alone. I have to prove whether the charge made against the SD by the Prosecution is justified on the basis of the Charter and, so far as this is admissible according to the Charter, on the basis of international law, national laws, and the basis of law developed from jurisprudence.

I shall first of all take a stand on the legal problem, in order to discuss in the second part of my presentations the factual circumstances under consideration of the outcome of the evidence.

The first part divides itself into two sections:

In the first section, I discuss the questions arising from the law itself, in the second, questions of procedure.

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In the material legal part I shall

1. investigate the concept of the organizations and groups in relation to the SD. (Page A)

I shall then

2. investigate,

a) what prerequisites must be complied with in order that an organization or groups can be declared as criminal, (Part B)

b) what conclusions can be drawn from these confirmations. (Parts C and D)

Finally I shall investigate

c) whether the basis nulla poena sine lege is opposed to a sentencing of the SD. (Part E).

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1. Main Part.

Part I.

A.

1) I start with the explanation of the word "SD", Security Service. This word had no unequivocal meaning. By SD one first understood:

a) the SS-Formation SD

b) Offices III, VI and VII

These were, at it is shown from the interrogations of the witness HOEPPNER 1) two completely different unions of persons.

To a): To the SS formation SD belonged all persons who were members of the SS or were candidates, and who were employed with the Security Police or with other similar Police organizations (e.g. custom frontier protection) or with the SD Intelligence Service. This SS-formation SD had no tasks and no purpose. It exercised no activity in order to fulfil a common general purpose. Its members never met for a common service or at other general gatherings. They lacked any feeling of solidarity, as they served independently of each other in different organizations. 2)

It was purely a matter of a registered combination of SS members and SS candidates of certain professional groups.

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1) transcript of commission of 21 June 1946, Page 1609,
transcript of meeting of 1 August 1946, Page 14489 pp, 14531

2) Testimony HOEPPNER before the commission and before the Tribunal mentioned above.

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The members of this SS-special formation SD wore the SS uniform with the badge "SD" on the left sleeve. Their different branches were thus not outwardly distinguishable.

To b): Offices III, VI and VII were the home Intelligence Service, the foreign Intelligence Service and scientific research. They were the SD offices in the Reich Security Main Office (RSHA) which was founded in 1939, in contrast to the security police (Sipo) offices IV and V. Office VI was united on 12.11.44 to the military Counter Intelligence of the united German Intelligence Service. 1)

There was moreover the Reich Security Service, which was again something different. The Reich Security Service provided the guard for leading personalities of the State. This unit did not belong to the Reich Security Main Office and was also not part of the SS. The Reich Security Service was under the then brigade leader RATTENHUBER, whose immediate superior was HIMMLER.

2. Offices III and VI of the Reich Security Main Office, the home Intelligence Service and the foreign Intelligence Service are [illegible] indicted.

Office VII, although designated as SD together with offices III and VI, is not indicted. 2)

When speaking in my further statements of the SD, I only mean by this the indicted offices III and VI.

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1) Doc. SD No. 1 - USSR 120,
Affidavit SCHELLENBERG, SD No. 62

2) Minutes of Commission of 23.7.46, page 3344 (German)

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Departments III and VI of the RSHA were not organized until September 1939.

In a formal sense, therefore, the Prosecution can only refer to the period which has elapsed since that date. In contradiction to this, however, accusations have also been made against the SS relating to the time before that. Therefore, against the formal text of the indictment, I shall also make the time before that the subject of my speech.

3) Departments III and VI were not indicted separately, but as a part of the SS.

The Prosecution, therefore considers the SS as an organization or group within the meaning of Article 6 of the Charter and the SD merely as a part thereof.

Is this right?

To decide this question requires a definition of the terms organization and group within the meaning of the Charter.

The American and the British Prosecutors in their fundamental speech of 28 February 1946 considered the following conditions necessary for the term organization.

1) An alliance of persons with an identifiable relationship,

2) a collective general purpose,

3) the voluntary character of the alliance.

On this definition, which is also in accord with German jurisprudence (Juristische Rundschau 1928, page 688), I shall base my further arguments.

The decision, therefore, hinges upon the questions, as to whether there existed between SS and SD:

a) an identifiable relationship,

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b) a collective general purpose.

For the period up to the end of 1933 and beginning of 1934 this must be answered in the affirmative. To that extent I refer in particular to the statement of the witness HOEPPNER.[1)]

For this period, therefore, the arguments of the defence counsel for the SS are applicable to the SD and I shall in consequence make no fundamental statements for this period.

For the later period the question as to whether an identifiable relationship existed between the SS and SD must however be answered in the negative.[2)]

The Main Office for National Security was not one of the offices of the SS Supreme Command, as has been asserted by the Prosecution. It is also not true that the Main Office for National Security was a department of the SS.[3)] To that extent the Prosecution contradicts itself, since the secret State Police, which was Department IV of the Main Office for National Security, is not indicted as part of the SS, but separately.

If the assertion is made in the Trial Brief against the SS, page IX, that the SD was an espionage division of the SS, this is obviously inasfar as a division of the SS is meant, a case of confusing it with the separate SS formation, SD.

There was no supreme common command over both the SS and SD after 1934.

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1) Transcript of Session of 1 August 1946, page 14493 (German)

2) Witness KRAUSE, transcript of commission, page 2348 "

" REINECKE " " " " 2675 "

" REINECKE transcript of session " 14772 "

" v.EBERSTEIN " " " " 14870 "

" HAUSER " " " " 14700 "

" HOEPPNER transcript of commission,

" HOEPPNER transcript of session, " 14498 "

SD affidavit No.32, 33, 27, 61 and 63.

3) Trial Brief against Gestapo and SD page 19 (German)

4) Trial Brief against SS, page 8, witness HOEPPNER before the commission and SD affidavit No.33 OHLENDORF.

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The connection between the SS and the SD required for the conception of Organizations was not created by the person of HIMMLER; in that case this obvious connection must have existed with the police and would have existed even with the reserve army since 1944. 1)

It is true that HIMMLER strove for the amalgamation of the SS, SD and the police by creation of a State Defense Corps. 2) Here, however, it is the question of future plans which have as yet not materialized. 3)

This required connection has not been created either by the Higher SS- and Police Leaders as they had as a matter of principle neither an essential nor a disciplinary directive right against the members of the Offices III and VI. 4)

The required identifiable relationship for the conception of the Organization could not have existed since 1934 for the simple reason that only 10% of the chief and honorary members of the Organization SD were members of the SD. 90% were not members of the SS and did not wear the uhiform of the SS Special Formation SD with the insignia SD. During the war about 50% of the SD were women. 5)

Aside from the required recognizable connection between the SS and the SD there was also missing since 1934 a collective general purpose. For this I refer to the testimony of HOEPPNER. 6)

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1) Affidavit SD No. 33

2) Document 1919-PS.

3) Affidavit SD No. 2, Witness HOEPPNER Minutes of the Session 1-8-46, page 14500 and Commission Minutes (German).

4) Affidavit SD, Witness v. Eberstein Minutes of the Session, page 14640, witness HOEPPENER Commission Minutes (German).

5) Witness HOEPPNER, Session Minutes page 14499, Affidavit SD No. 32 and 27.

6) Witness Hoeppner, Session Minutes 1-8-46, page 14500, Affidavits SD Nos. 27,32 and 33.

The SD therefore was part of the SS only until the year 1934 as an organizat according to Article 9 of the Statute. After this period the SS and SD were no longer united in one organization according to the statute.

Did the SS and the SD form a group during the period after 1934 according to Article 9 of the Statute?

It may be doubtful whether the legislator really intended to make an importa distinction from a legal point of view between Group and Organization. The wording of Article 9 of the Statute could speak against a distinction. It says there that Groups or Organizations can be declared criminal Organizat' Also the Group, therefore, is to be declared a criminal Organization. If, however, a distinction is assumed, I wish to state in this connection:

The Prosecution has stated that the concept of the Group is to be take from common usage. When explaining this concept common sense should be used According to common usage the Group is a numerically small community of persons. For 15-20 persons we speak of a Group, not, however, for larger unions. There is some talk about the fact that Groups were formed within a party, an association.

The Group is part of the Organization according to common usage. The Group, therefore, is the subordinate concept of the Organization.

In this connection I should like to point out a resolution of the German Supreme Court of the Reich of 8 May 1922.[2] In this resolution it has been said that a Group having made it its task to pursue a definite individual aim may be singled out from the members of a large majority of persons who pursues some other general aims.

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1) Session Protocol, Page 5192 (German).

2) Legal Weekly Publication 1924, Page 468.

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This may occur particularly if the large majority of persons pursue approved aims with approved means, part of the members, however, (perhaps without the others being informed of it) united themselves for activities which strove to further the general aims in a prohibited way.

Article 9 of the Statute, therefore, might be explained as follows:

We can declare as criminal:

1) an Organization or

2) a Group as part of an Organization

The SD could only then have been a Group during the period since 1934, if it had been part of the SS. This, however, as it has already been stated, is not the case.

Result: Since 1934 the SD was not part of the SS as an Organization or Group according to Article 9 of the Statute.

4. I come to a further question:

Were the Offices III and VI a centralized Organization or Group, or were they two seperate Organizations according to the Statute ?

The Offices III and VI had neither an identifiable relationship nor a collective general purpose. This holds good for the time after 1939 when the Offices III and VI belonged to the Reich Security Main Office (RSHA), as well as for the period prior to 1939, when they were united in the SD Main Office. Office III was the Home Intelligence Service, Office VI the Intelligence Service Abroad [1]

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1) Witness HOEPPNER, Protocol of Commission of 21. 6. 46, Page 1611, Transcript of Session of 1. 8. 46, Page 14491,

Affidavit SD, No. 61

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On the basis of the presentation of evidence it can be considered as proved, that the aims, tasks, activities and methods of offices III and VI were always completely different ones.

The fusion of Offices III and VI in the Reichssecurity Main Office does not suffice to prove a recognizable connection between both agencies, and that they both have a general task in common.

Office IV and the Criminal Police, Office V also belonged to the Reich Security Main Office. The Gestapo is rightly considered by the Prosecution as an independent organization and has been charged as such. The Prosecution has evidently the same opinion regarding the Criminal Police, against which no charge was made. Just as little as the Gestapo and the Criminal Police have lost of their character as independent organizations, as little could the fusion of Offices III and VI create a recognizable fusion and common general task for both these offices. The Reich Security Main Office was only the designation of an Administration. [1)]

<u>The SD therefore was no uniform organization within the meaning of the Charter, but Offices III and VI could only have been two seperate organizations, had the presupposition of voluntary membership been accepted.</u>

5. According to the speech of the Prosecution it should not be necessary for each member to be a voluntary one. The Prosecution considers it unimportant if a small part or small percentage did not join it voluntarily.[2)]

1.) Witness BEST, Minutes of Commission of 8 July 46 -page 2503 (German)

2.) Minutes Session page 5188 (German)

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Let me point out in this respect that this juridical standpoint does not tally with German jurisdiction. In a judgment in 1928, the German National Court required for a society, which corresponds to the Charter's concept of an organization, the voluntary, contractual reunion of all members. 1)

I leave the question undecided as to whether an organization can be considered as existent when a small percentage of the members did not belong to the society on the basis of a voluntary contractual reunion, because such is not the case with the SD.

The examination of evidence has revealed that during the War, the membership of a considerable portion of the members of the SD was not voluntary but was based on a legal ordinance, either on compulsory service or emergency service. I refer to the deposition of the witness HOEFFNER, 2) who revealed that during the War an estimated 50 to 60% of the members belonged to the SD by virtue of a legal ordinance.

These statements are supported by the affidavits which disclose on an average the same percentages for the most widely different services. 3) I, moreover, refer to the collective list of affidavits submitted by me on the subject.

The legal prescription on which compulsory service and emergency service were based since 1939 are to be found in Document SD 65-69 submitted by me. I especially refer in this respect to Document SD 65.

1) Juridical Gazette 1928, Page 680.

2) Session Transcript Page 14507 (German).

3) SD Affidavits No. 21, 57, 58, 59, 60.

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reproducing the circular of 16 October 1940 in the text of that of 1 July 1942. It is expressly stipulated in this circular that as emergency headquarters the SD commands can demand that replacements and reinforcements be put in readiness for them.

Likewise, withdrawal was not possible during the war for those who joined the SD voluntarily. [1]

It is therefore not accurate when it is brought forward by the Prosecution that membership of the SD was voluntary.[2]

Consequently, on the basis of the juridical standpoint brought forward by the Prosecution, Offices III and VI cannot, for the time of war, be considered as organizations as conceived by the Charter.

Neither were they groups in the sense of the Charter because for the group as part of the organization, the factual features of the organization, including free will, are necessary.

As a result, the following can therefore be concluded:

1) Until 1934 or thereabouts, the SD was part of the SS.

2) In the period from 1934 - 1939, the Home Intelligence and the Foreign Intelligence were separate organizations.

3) During the time after 1939, they were not organizations or groups in the sense of the Charter because the membership of a large part of the members was based on legal ordinance.

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1) SD Affidavit No. 22.

2) Trial Brief against Gestapo and SD Page 19 (German).

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Consequently, for this reason alone, Offices III and VI cannot, since 1939, be declared to be criminal organizations.

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B.

I now come to the question of what characteristics an organization must have to be called criminal.

1. The Prosecution has submitted that the organization

a) must pursue a purpose which according to the definition of Article 6 of the Charter is punishable, or

b) pursue legitimate purposes through means which according to Article 6 are liable to punishment.

A further requirement according to the Prosecution is that the guilt of the members be established,[1] this means the members must have known that the organizations pursued goals termed punishable according to Article 6 or legitimate goals through means termed punishable according to Article 6.

However, in the submission of the Prosecution an organization can be declared criminal also when not all of its members knew about the punishable purposes.[2]

This opinion cannot be agreed to.

Professor Dr. EXNER established in detail and convincingly in his final pleadings for the Defendant JODL that the action per se is not a crime but that guilt must be there also. Without guilt no punishment. Going further, Professor Dr. EXNER has established that this principle can also be found in foreign decision. In so far

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1) Proceedings, session of 28 February 1946, pages 5188/5190

2) Proceedings, session of 28 February 1946, page 5190

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I wish to refer to these arguments [1] and in that connection I merely wish to point to the American law of 28 June 1940 previously mentioned which the Prosecution cited as an illustration of the fact that organizations can be declared criminal. This law demands explicitly the knowledge of illegitimate goals.

Also for the English law it is a general practice that a person can not be convicted by penal law unless it can be proven that the guilty mind (Schuld) was involved. [2]

The argument of the Prosecution that knowledge on the part of some of the members is sufficient for sentencing the organization could be upheld if the language of law No. 10 were different, in other words if by reason of law No. 10 an investigation were provided to determine whether the individual member had knowledge of the incriminating goals and activities of the organization.

This is not the case, however. Law No. 10 provides conviction of each member merely by reason of the fact that he belonged to an organization which has been declared criminal. The members can no longer argue in subsequent proceedings that they did not know of the criminal goals and purposes. The opinion held by the Prosecution would thus mean that in subsequent proceedings persons will be convicted who had no knowledge of the criminal goals or activities. This would be contrary to the fundamental

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1) Final pleadings Prof. Dr. Exner, for Jodl, pages 100 and 105

2) Archbold, 30th edition 1938, page 23 - Chisholm v. Drulton 22 Q.B.D. 736 - 58 L.J.M.C. 103 - R.V. Twose, 14 Cox 327

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to the principle known to penal law in the entire world - previously referred to by me - according to which the proof of objective facts is insufficient for conviction and that the presence of guilt (guilty mind) must also be proven. In view of this and since subsequent proceedings will not deal with the guilty mind it is imperative that the guilt of all members be established in this trial before the International Military Tribunal. Only to the extent that this guilt has been established could the organization or individual groups as a part of the organization be declared criminal.

2) The guilty mind also includes cognition of illegality. Also in this respect I should like to refer to Prof. Dr. EXNER's[1] argumentation whereby he established convincingly that every serious crime - and only serious crimes are being tried here - does not presuppose the cognition that something punishable is being done but does presuppose the knowledge that it is a crime to act in that manner; that the perpetrator must be cognizant of the fact that he commits an infraction of law, or that he is acting in a manner considered naturally wrong. Prof. Dr. EXNER also has established that these principles prevail not only in the German penal law but he also cites a number of examples from the English law.

In other words the members not only are required to have known the goals or methods of the organizations, which would correspond to the facts with which Article 6 is dealing, but the members must also have been aware that these goals or these methods are illegal or in any case contrary to law. In that connection, on the orther hand, the question arises whether this cognizance

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1) proceedings of session of 19 July 1946, page 13517

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must have been present in all members or whether knowledge in some of them is sufficient. Because - for reasons which I already explained - only he is liable to punishment who was conscious of the illegality and because this consciousness can no more be examined in subsequent proceedings it must be established in these proceedings for all members for otherwise those members might be punished by virtue of Law No.10 who did not have this consciousness.

To renounce the factual criterion of the cognizance of illegality would mean that the demands made of the ordinary members are unduly high. The cognizance of illegality may be absent even in the case where a perpetrator executes an order given him.

The provision of Article 8 of the Charter merely eliminates the order as a general reason for exclusion from punsihment; but it is possible for an order to exclude the cognition of illegality in the individual case. He who has recognized the illegality of his action cannot - according to Article 8, justify himself through reference to an order. In a case, however, where a person considers his action right and legal by virtue of an order given him he must be exonerated. Provisions of Article 8 of the Charter can have only this meaning and this interpretatio

The question whether appeal by virtue of an order received from superiors furnishes ground for exoneration is not left uncontested in international literature.[1] Article 8 of the Charter ruled on this controversial question that the perpetrator cannot make appeal because of an order obeyed. This explains why I did not discuss this controversial question in greater detail.

1.) Garner, International Law and the World War, volume II, page 483 ff.

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All authors, however, who deal with this question, presuppose that the subordinate has known that the order was illegal and unjust.[1)]
They deal only with the question as to whether the subordinate, by knowing the illegality and unlawfulness of the order had grounds for exemption from punishment.

It is to be concluded herefrom that with this lack of knowledge, which can also be founded on an order, the perpetrator is exempt from punishment.

The French Prosecutor also stated that the order of a superior does not protect the execution of the deed which was obviously punishable

It would lead to an illegical result, if one considered it inadmissible, to cite an order as proof of the lack of illegality.

He who carried out an act without an order, would not be punishable if he lacked the knowledge of its illegality. If he, however, commits the same deed on the strength of an order, he would have to be punished, if one does not agree with my point of view. Such a misinterpretation would contradict the meaning and purpose of the Charter.

Orders can, however, put the perpetrator into a state of compulsion, and for this reason exclude the guilt.

It is a general rule of English Law, that he is protected from punishment who has committed crimes under the authoritative influence of others, i.e. not as a result of an unchecked and deliberate intention.

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1) Garner, International Law and the world war, Vol. II, page 483 pp.

2) Transcript of the Tribunal p.2 24 (German).

3) Archbold, p.20, 4 Bl. Com. 27 : 1 Hale 44/51.

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According to English Law this protection also exists in the public relations of society, as, for instance, between subjects and the supreme power of the State and excuses obedience to the existing authority if bodily force is exercised or is immediately imminent. 1)

Thus I arrive at the following result:

An organization could only be declared criminal, if

1) its purposes or expedients correspond with the facts of the case as stated in Article 6 of the Charter,

2) all members have known these purposes and expedients and

3) all members were conscious of the fact that these purposes were illegal or unjust.

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1) Archbold, page 20.

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C.

This results give rise to two further questions:

1. A legal one, whether the condemnation of an organization can be brought into harmony with the general rules of International Law and national law, (Part C)

2. A factual one, whether the necessary elements of the case can be established at all for all members of the SD and/so whether a trial of this kind can be held at all. (Part D)

Before I begin to discuss the legal question, I take the liberty of drawing the attention of the Tribunal to the fact that the stipulation in Article 9 was not a compulsory rule, but only an optional rule. Even if the conditions are present for declaring an organization as criminal, the Court can refrain from doing this. It may be assumed that the legislators pursued a purpose in having prescribed the condemnation of the organizations as NOT MANDATORY - even if all the conditions for this were fulfilled. It may be presumed that the legislators who promulgated the Charter wanted to submit Article 9 to examination under the rules of international law.

By this the authors of the Charter apparently wished to transfer the judge's right of examination to the International Military Tribunal with regard to Article 9 - and I expressly emphasize, in order to avoid any misunderstandings, only with regard to Article 9, because in other respects the Charter is a mandatory rule. The International Military Tribunal should examine Article 9 to determine whether this rule is a further development of the legal concepts of International Law and national laws, or whether it is in contradiction to these rules. The fact that Article 9 is a rule previously unknown in law should especially favor such an intention. The question as to whether a formal law is in contradiction to

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other laws, cannot be immediately looked over when the law is issued. This can only be determined in the course of the practical application of the law and after research by scholars.

English constitutional law with its special concept of the constitution does not recognize the judge's right of examination. The Union of the Socialist-Soviet Republics does not recognize the judge's right of examination either. 1) In France the judge's right of examination is denied by the courts. However, the judge's right of examination is almost unanimously accepted by legal scholars. 2) In the United States the judge's right of examination is generally recognized. 3)

The courts of the United States have to compare the laws which have been issued with the constitution, and to discover the true intentions of both laws.

I believe that the international community of nations stands closer to the federal conditions of the United States, and that therefore the International Military Tribunal is justified in examining the relationship of Article 9 of the charter to the generally recognized rules of International Law and also the law of the national states, which, according to the statements of Justice JACKSON are likewise to form the legal foundation *) of the decision.

Concerning Article 9 of the Charter, it must be added that it is a rule unknown to the previous laws. It may obviously be presumed and undoubtedly needs no further explanation, that the nations which promulgated the Charter wanted to develop further the basic concepts of the prevailing Interna

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1) Timaschew, Basic Principles of Soviet Russian State Law (Grundsaetze des Sowjetrussischen Staatsrechtes,) 1925

2) Berthelemy in the Political and Parliamentary Review (Revue Politique et Parlamentaire), 1925, Page 357, [illegible]2, Hondel, Jurisdictional Control of the Constitutionality of Laws (Controle Jurisdictionnel de la Constitutionalit de Lois), 1928

3) James Bryce: The American Commonwealth, 1924, Page 155 of the German translation by Professor J. Singer.
Dr. Freund , Professor of Law at the University of Chicago:
The Public Law of the United States of America (Das Oeffentliche Recht der Vereinigten Staaten von Amerika, Page 38 ff.

*) see page 24

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tional law and bring it into a legal form, and that in doing this they completely lacked any intention of placing themselves in opposition to the rules of International Law.

All written law, however, requires to be gone through and revised carefully and in a scholarly way so that a reasonable application in practice will be possible. Only in this way are the Courts placed in a position to reach verdicts which are really in accordance with the facts.

The International Military Tribunal, therefore, on the basis of the judge's right of examination to which it is entitled, will have to examine the relationship of Article 9 of the Charter with the general basic legal principles of International Law and the national laws of civilized nations.

In this connection we have to start from the legal significance of the assertion, permissible according to Article 9 of the Charter, that an organization can be criminal.

The rule of Article 9 varies basically from Criminal Code for Organizations (Verbandsstrafrecht), as, for example it has been introduced into English law by Section 2 (1) of the Interpretation Act of 1889.

The punishment according to the Criminal Code for Organizations (Verbandsstrafrecht) is directed at the organization. According to Article 9, the sentence can no longer affect the organizations because the latter have been dissolved in the meantime and do not any longer exist. THE SENTENCE IS RATHER DIRECTED AGAINST THE INDIVIDUAL MEMBERS, because the verdict of the Court is the basis for the subsequent proceedings on the basis of Law No. 10.

Two further important differences must be added:

1) According to the Criminal Code for Organizations (Verbandsstrafrecht), and also according to the Criminal Code for Organizations (Verbandsstrafrecht) of English law, in particular, no imprisonment (Freiheitsstrafe) is permitted. (2)

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1) Pharmaceutical Society of London and Provincial Supply Association, 5. App. Cas. 357,369; 49L.J.Q.B.736; R. v. Great West Laundry Co. 13 Manitoba 66. R.v.Cory Brothers & Co. Ltd.27, 1.K.B. 810. (Archbold a.a.O. Page 10)

2) Pearks Gaston & Tee v. Ward (1902) 2.K.B. 1,11, Channell, J; 71 L.J.K.B.656

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The sentence according to Art. 9 ought to show nevertheless the basis for the inflicting of prison sentences and even of death sentence which are contained in Law No. 10.

2) According to the corporate criminal law of the English law, no crimes and offences can be prosecuted.[1]

If one looks over the English course of law, we find that corporations have been condemned only on account of excesses, especiall on account of neglect of public obligations, e.g. failure to repair streets or bridges, although a similar obligation existed,[2] blocking a street by a railway company,[3] or on account of publishing a libel.

The subject-matter of the proceedings of Art. 9 are on the other hand major crimes.

Article 9 of the Charter does not mean, accordingly, the introduction of the corporate criminal law into the international criminal law.

A number of foreign laws have been introduced by the Prosecution, according to which it should be permissible to declare an organization criminal: form the American Justice, the law of 28 June 40 and the "California Act";[4] from the English law the "British India Act No. 30" of 14 Nov 36; from the French law, the law of 18 Dec 93, Section 263 of the French Penal Law Code, Section 1 of the Law of 26 Aug 44 and 2 legal decisions from the Russian law.

Further German laws were cited:

1) The decisions of Art. 128, 129 of the German Legal Code Book of 1871,
2) the law of 22 Mar 21, RGBl. 1921, P. 235 [5]
3) the law of 21 July 22-RGBl. 1922, P. 585

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1) Pearks Gaston & Tee v. Ward (1902) 2.K.B.1, 11, Channell, J; 71 L.J.K.B. 656
2) Birmingham and Gloucester Ry; 2 Q.B. 47; 9 C & P. 469,
3) R.v.Great North of England Ry 9.Q.B.315; 16 L.E.m.C. L.E.m.C.L.; Att. Gen. v. London and North West Ry (1900) 1.Q.B.78
4) Statutes of 1919, Chapter 188, P. 231,
5) Page 5181 of the German transcript.

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In this connection it should be noted that according to all of these laws only individual persons may be prosecuted and that in the proceedings against the prosecuted individual persons is without legal jurisdiction for the members not prosecuted and it thus cannot established that the organization has a criminal character. It can be thereby established in proceedings against some members of the union that the organization pursues aims contrary to law and in a subsequent proceeding against other members this question can be denied.

The lack of extension of the jurisdiction of law to cover the members not prosecuted is nevertheless the decisive factor which differentiates these laws from Point 9 of the Charter.

The decision according to Point 9 of the Charter is, in contrast to the laws cited by the Prosecution, binding in the proceedings against the individual members before the Military Tribunal, and indeed the sentencing of the organizations through the International Military Tribunal contains not only the effective confirmation of the objective facts in the case, but furthermore an effective confirmation of guilt for all the members, as well as consciousness of the violation of the law*, i.e. a legal efficacy of a hitherto completely new significance in penal law.

The opinion according to Section 9 deals neither with the further development of the corporate law, nor with the sentencing of individual persons because of the membership in a criminal community of persons, but with a judgment of collective members of the organizations, because the essential facts have been determined juridicially for the collective members, which form the basis for the later judgments in the proceedings according to Law No. 10. In the subsequent proceedings, the question of the membership can now be tested also. In other words: We are here concerned with a collective judgment of collective members of the organization.

*) cf. Page 21

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What is the attitude of international law scholars toward the question of collective condemnation.

The majority of the American, English and French international law scholars reject collective condemnation as "arbitrary and contrary to the elementary principles of justice".[1] The well-known teacher of international law Garner states rightly that collective condemnation, even if it is applied in the mildest form, necessarily includes the punishment of innocent persons.[2] Garner further goes on to explain that for this reason collective condemnation should never be used, if other just measures would serve the same purpose.[3] The French legal scholars Bonfils and de Martens have condemned the basic principle of collective punishment in detailed discussions, and expressed the hope that collective condemnation would disappear altogether.[4]

These statements should be agreed to in their full extent.

In the proceedings against the organizations past crimes are to be atoned for. In order to achieve this aim, however, the indirect way of condemning the organizations is not necessary. This aim can be achieved by instituting proceedings against individual persons who participated in these crimes, as was also done in a large number of cases.

ON THE BASIS OF THE GENERAL BASIC LEGAL PRINCIPLES OF INTERNATIONAL LAW AND THE NATIONAL LAWS OF CIVILIZED STATES, therefore, use should be made of the optional rule of Article 9, and one should refrain from declaring the accused organizations as criminal. The persons responsible for the crimes can be punished in individual proceedings.

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1) Garner, International Law and the World War, Vol. II, page 154
2) " " " " " " " " " " 161
3) " " " " " " " " " " 161
4) Bonfils, Droit Int. Pub. sec. 1234, and G.F. de Martens, Traite de Droit Int., Vol. III, Page 265.

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D.

There now arises the other questions whether it is at all possible to establish in this trial the required factual characteristics.

To do so would appear impossible and not feasible, Even the proof that all members of SD were informed of some of the criminal goals would appear impracticable. The guilt (guilty mind) can always be established for one person only. All guilt is bound to a person. If many persons participate in an offence or a crime the judge must examine the entire group of persons involved singly, in order to determine guilt, innocence, complicity in a concrete and well defined manner.

It seems entirely impossible, however, to determine that all members were cognizant of the illegality and unrighteousness of the goals and tasks.

In this connection we must also examine what was to be the standard for members of the SD to determine whether the goals or means were illegitimate or unrighteous. According to the German law in force while the organization was in existence those goals and means were permitted, as I shall show in the section dealing with facts. It may be conceded that the German legal measures conflicted in part with the provisions of International Law and that therefore goal and methods - while not illegal according to the law of the GGerman State and not wrong-can nevertheless be considered illegitimate and unrighteous according to the concepts of International Law. But this is not the decisive point. What counts is whether the members, that is all the members, have recognized the illegality and unrighteousness of goals and methods which were legitimate according to German laws.

The wellknown teacher of International Law, OPPENHEIM has stated that the Law cannot demand that an individual can be punished for a deed which he was forced to commit in virtue of the law.[1)]

If the best known, teachers of International Law cannot agree what is right and wrong, can one demand from ordinary members of the Organizations that they recognize it?

The capital crimes which were discussed during the trial, for instance, the annihilation of the Jews and the unhuman treatment in the concentration camps, require no discussion as to right and wrong. The organizations, however, are charged with a great number of punishable offences, and the question arises whether

1. the perpetrators generally and

2. furthermore all members, knew of the injustice and the illegality,

and can be answered in the affirmative without more ado.

The decision is very difficult as to whether just the acts committed during the war were recognized as illegal and unjust. In peace time everybody knows that he must not kill and that foreign property is inviolable. These acts are however partly justifiable in wartime. The soldier can kill the enemy. The confiscation of foreign property is permitted under certain hypotheses. The individual who commits the deed and beyond him the members, have therefore only the consciousness of illegal acts which have been committed during the war, when they are aware of the limitations which are set by law.

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1) Oppenheim, International Law, Vol II, page 342, note 3.

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A strict examination of these organizations is particularly necessary, because their members were for the most part men who had no juridical knowledge, and to whom the limitations of International Law are unknown. I believe that this is also the opinion of the Chief United States Prosecutor who described in his opening speech of 20 November 1945, how a soldier assigned to an execution squad could not hold an investigation as to whether the execution was legally admissible.[1)]

At the examination of the question concerning the knowledge of the members regarding the illegality and injustice the mistake should not be made of assuming that the simple members of the organization had the knowledge which we have gained in this process on the basis of documents coming from secret archives.

Particularly in the proceedings against the SD a great number of secret papers, documents and regulations were produced, which were only intended for the internal administration of individual offices. The contents of these papers therefore testifies, that they had not been brought to the knowledge of all members, but only to a small determined circle. In this connection I wish to refer for example to the well-known document L 180, the STAHLECKER Report dealing with the activity of Task Group A.

It can therefore now be ascertained, that a great part of the evidence produced by the Prosecution does not suffice for the collective condemnation of the members of the SD.

1) Transcript of session, page 42

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The documents do not even prove that the offenders themselves were conscious of illegality, because in order to establish this, one must know the particular circumstances of the act. But it must still be proved that the members of the SD

a) knew of these acts

b) recognized that the acts were illegal or at least wrong.

I do not consider it necessary to discuss this question in the second part of my statement regarding each act with which the SD was charged, but in my opinion it is sufficient if I describe the problem in general and leave the examination in individual cases to the Tribunal. In each individual case, however, with which the SD is charged, and with each document submitted against the SD, the Tribunal will not be able to avoid this examination.

My statements made hitherto may lead to the conclusion that the evidence of guilt cannot be summarily determined by drawing conclusions from the number of crimes and the type of crime committed, from the knowledge all the members have of these deeds and from their consciousness of illegality. It is rather necessary, that the proof of the knowledge and consciousness of illegality should be considered in special proceedings in each individual case of a member of the organizations, so that on account of the circumstances the individual members should be given the opportunity to reply to them.

Should the members ever have had knowledge of real facts of individual criminal acts, no proof is given, that they knew,

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that their organizations were involved therein.

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E.

A condemnation of the organizations is furthermore in opposition with the principle of penal law nulla poena sine lege. This principle has already been treated in detail by the defendants of the principal accused. I shall not repeat these statements but only point out briefly the following points:

In his speech of indictment on 29.11.1945 [1] the American Chief Prosecutor has said that the defendants could not invoke this principle because they had themselves transgressed it. This argument in no way concerns the members of the Organizations because the members had no influence on the legislation but were themselves objects of the legislation.

The Prosecutor of the Union of Socialist Soviet Republics has pointed out in his final speech on 29.7.1946 [2] in the discussion of this principle, that the Charter of the International Military Tribunal is an unviolable law and absolutely had to be carried out.

The Charter is however in no way violated and shall also be carried out if the Tribunal considers the principle nulla poena sine lege and does not condemn the organization, because paragraph 9 of the Charter is merely a can prescription. The Chief Prosecutor of the Union of Socialist Soviet Republics has said further that the Charter represents principles which are contained in a succession of international agreements and in the legislation of all civilized peoples.

It merely appears from the international agreements and laws of civilized peoples that punnishable offences

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1) Page 33 of the minutes of the session (German), of 20.11.45

2) Page 13212 of the minutes of the session of 29.7.46 (German).

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must he judged by individual proceedings.

The principle of collective judgment of communitiess of persons was up to now unknown in International Law. On the contrary it is denied, as said before, by the seience of International Law.

Until the First World War it was the custom to include in peace treaties amnesty clauses for war crimes committed. After the First World War the general principle developed that individual members of fighting forces might personally be made responsible after the war for violations of war laws. 1)

The declaration of the chiefs of state of the United States of America, Great Britain and the Union of Socialist Soviet Republics of 2 November 1943 mentioned by the Prosecutor of the Socialist Soviet Republics orders expressly that individuals shall be made responsible. The declaration contains no statement to the effect that the collective condemnation of communities of persons is permissible.

Paragraph 9 of the Charter is therefore not the expression of an internationally admitted legal maxim. This clause on the contrary creates a new law and cannot be made applicable with retroactive force, for instance for the time since 1921 as purposed by the Chief Prosecutor of the United States or even for the time from 1935 on as purposed by the Prosecutor of the Union of the Socialist Soviet Republics in his final speech on 29-7-46.

The condemnation of the organizations is therefore also in opposition to the principle nulla poena sine lege .

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1) Fenwick in International Law. 1924, page 578.

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Section II.

F.

In the 2nd section of Part I, I come to the discussion of the questions of procedure resulting from Parag. 9 of the Charter. In legal procedure, according to parag. 9 of the Charter, an organization on group may be said to be criminal

a) in a trial against a member of such organization or group and

b) in connection with any action by reason of which the accused is condemned.

Both these hypotheses must be realized. Of the principal defendants, onl the defendant KALTENBRUNNER, Chief of the Security Police and SD is involved, as member of the SD.

I.

It can be gathered from the words "in connection with any action by reason of which the accused is sentenced", that every action of the member of the organization or group is sufficient to declare the organization or group as criminal.

This cannot be the meaning and purpose of this definition, as I should like to illustrate by the law of the United States of 28 June 1940 already quoted.

When persons belonging to one of the associations mentioned in the Act of 28 June 1940 are arraigned before a tribunal in several different proceedings, an admittedly extensive examination of evidence but doubtful in its results must be effected in each proceeding, as to whether the association to which the person belongs fulfils the primary conditions contained in the above legal stipulations.

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Then it could happen that in one trial it is established that the organization had pursued the purpose, named in the law of 28 June 1940, while in other trials the result of the testimony is not considered as sufficient.

In order to avoid these difficulties it could be decreed by a provision of the law that the trial be held against one or several members of the organization, the other members who have not yet been accused are given the possibility of a legal hearing and - if a member is condemned on account of his membership in an organization within the meaning of the decree of 28 June 1940 - the Tribunal makes the declaration, to take effect for all members of the organization, that the organization fulfils the purpose mentioned in the decree of 28 June 1940.

Such a provision would achieve the following:

1) the testimony on the aims, tasks and activities of the organization would be taken only once, and

2) contradictory decisions on the objective tasks, aims and activities of the organization would be avoided.

This purpose is apparently also the intention of par.9 of the Charter. The situation is to be avoided whereby the Military Tribunal in the individual occupation zones in the proceedings against the members of the accused organizations would have to examine the question of the character of the organization each time and perhaps come to contradictory decisions.

Certainly, it would be sufficient for the accomplishment of this purpose, if the legal effect went only as far as the objective determination of the tasks, aims, and activities of the organization and the determination of guilt were left to the subsequent proceedings.

With regard to Law No.10, as it was pointed out already, the condemnation of the organizations according to par.9 of the Charter, contains not only the objective statement of the aims, tasks,

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The defendant KALTENBRUNNER has not been accused for belonging to the SD as a criminal organization, but is to be sentenced for other punishable offences.

Therefore, taking the statement of the American Prosecutor as basis, it must be considered as inadmissable that for the proof of the criminality of the SD evidence have been produced, which have no connection with the criminal actions for which the defendant KALTENBRUNNER has been charged.

II.

Finally, it must still be proved which connection must exist between the period during which the accused member belonged to the organization and the period for which the organization is to be declared criminal. This purely legal question is completely different from the question of the period during which an organization was criminally active.

Here, the matter is only as follows: Can, in the proceeding against a defendant, the organization of which he was a member be declared criminal also for the period during which he did not belong to the organization?

According to the statement of the American Prosecutor the criminality of the organization has to be tested only on the strength of the defendants action. Such action of the defendant confines the examination, also from the standpoint of time, to the question as to whether the organization can be declared criminal. The evidence in the proceedings against an accused member can only justify the decision regarding the organization for the period during which the defendant belonged to the organization.

This temporal limit is justified also for the following reasons:

He who shall be sentenced, has the right to be heard.

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This right to be heard is not met by the making of statements before the Court. On the contrary it includes the right to participate in the whole proceedings. According to Par. 9 of the Charter, this right to participate in the entire proceedings is obviously not to be annulled, but restricted to only one person of the Organization mentioned, in order to save time, as they started from the principle that the depositions of further members as to the aims and tasks and activities of the Organization were cumulative. A member who did not belong to the Organization during the whole period for which the Organization is to be declared criminal, can define his attitude towards the question of the aims, tasks and activities of the Organization only for the duration of his membership. According to the principle of legal hearing it is therefore necessary that a member participates in the proceedings as a defendant, if he was a member of the Organization during the whole period for which the Organization is to be declared criminal.

For these judicial reasons also the Organization can be declared criminal only for the period during which the defendant was a member of it. Should an Organization be declared criminal for the entire duration of its existence, then a member must be indicted who belonged to it during the whole period.

For judicial reasons the SD, therefore, could be declared criminal only for the period during which the defendant KALTENBRUNNER was Chief of the SIPO and the SD, i.e. since January 1943.

The crimes with which Offices III and V are charged must have been committed during this period.

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Final Plea

for SD.

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